

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

SCOTT SYVERSON,

Appellant,

v.

STATE LOTTERY COMMISSION,

Respondent.

) Case No. RULE-01-0007

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** Pursuant to RCW 41.64.060 and EAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, RENÉ EWING, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on June 18, 2002. GERALD L. MORGEN, Vice Chair, reviewed the record and participated in the decision in this matter. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Scott Syverson was present and was represented by Edward E. Younglove III, Attorney at Law, of Parr & Younglove, P.L.L.C. Lawrence Paulsen, Assistant Attorney General represented Respondent Washington State Lottery Commission.

1.3 **Nature of Appeal.** This is an appeal of a rule violation appeal of WAC 356-30-300. Appellant alleges the department violated the rules regarding his performance evaluation.

1.4 **Citations Discussed.** WAC 358-30-170; WAC 356-30-300.

## II. FINDINGS OF FACT

2.1 Appellant is a District Sales Representative and permanent employee for Respondent State Lottery Commission. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on March 20, 2001.

2.2 Appellant is a District Sales Representative (DSR) for Region 2 in the Tri-Cities area. Appellant has been employed with the Lottery Commission since 1990 and his anniversary date is October 28. As a DSR, Appellant's primary responsibility is to market lottery products to attain sales goals. Appellant's duties include identifying and soliciting new accounts and consulting with and advising retail outlets regarding the sale of lottery products. Appellant is also responsible for recommending where to setup dispensers, play centers, point of sale material, and signs within retail outlets.

2.3 WAC 356-30-300 sets forth the requirement for employee evaluations and requires that annual evaluations be conducted using the standardized employee performance evaluation procedures and forms prescribed by the director of personnel. Performance evaluations are designed to aid in communications between supervisors and subordinates. The annual evaluation is to be conducted during the 60-day period following the employee's anniversary date. The Washington State Department of Personnel implemented the use of the Employee Development and Performance Plan (EDPP), which is to be used by state agencies to evaluate general service employees.

2.4 Respondent has adopted Policy 120.019 that addresses the procedures to be used for evaluating employees. The performance evaluation policy, in accordance with the EDPP

1 instructions, indicates that an employee's supervisor is responsible for scheduling a mutually  
2 convenient time to conduct the performance evaluation conference and for completing the  
3 Supervisor's Worksheet portion of the evaluation. During a preview session, the supervisor  
4 discusses the evaluation process with the employee and provides the employee with his/her  
5 Classification Questionnaire (CQ) and with a blank EDPP form. The employee is responsible for  
6 completing the evaluation form and for giving feedback to his/her supervisor. When the supervisor  
7 and employee meet for a feedback session, they are to review the employee's CQ and discuss the  
8 worksheets. The policy also allows employees to make comments and/or rebuttal to an evaluation  
9 if he/she disagrees to any aspect of the evaluation. After the supervisor finalizes and signs the  
10 EDPP, he/she forwards it to the employee for his/her signature. The policy further states that an  
11 employee's refusal to sign the evaluation may result in disciplinary action and allows for the  
12 employee's second-line supervisor to act as a mediator if necessary.

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14 2.5 Mona Moberg, Assistant Sales Manager, became Appellant's acting supervisor in August  
15 2000. Ms. Moberg was stationed in Olympia, Washington, and she had little day-to-day interaction  
16 with Appellant. However, she visited the Region 2 office two to three days a week.

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18 2.6 In October 2000, Ms. Moberg began to prepare for Appellant's annual performance  
19 evaluation. On October 3, Ms. Moberg met with Appellant to spend a day accompanying him on a  
20 number of visits to his retail stores to observe his performance. Ms. Moberg indicated to Appellant  
21 that the purpose for meeting was to visit the retailers and gather information to use as a basis for his  
22 upcoming evaluation. Ms. Moberg explained the EDPP process and gave Appellant a blank EDPP  
23 form and a copy of his CQ. Ms. Moberg told Appellant they would meet again on December 11.

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25 2.7 On December 11, Ms. Moberg met with Appellant. Prior to the meeting, Ms. Moberg had  
26 gathered additional information on Appellant's performance by calling and interviewing

1 approximately nine retailers/stores serviced by Appellant. Ms. Moberg also contacted Gilbert  
2 Gomez, Telemarketing Representative, who worked closely with Appellant and his retailers. Ms.  
3 Moberg, on the advice of Employee Services, did not contact Appellant's former supervisor, who  
4 had been the subject of a demotion. However, Ms. Moberg found that the information she gathered  
5 on Appellant's performance was positive and constructive and helped her to complete a draft of the  
6 EDPP. When Appellant arrived at the meeting he was not prepared to engage in a feedback  
7 discussion of his evaluation. Appellant stated that they should be meeting for the preview session,  
8 not a feedback session. Ms. Moberg, nonetheless, wanted to discuss the substance of her proposed  
9 evaluation and to review Appellant's CQ.

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11 2.8 The evaluation period covered by Appellant's EDPP is reflected as October 1999 to October  
12 22, 2000. Within the body of the evaluation, under the section entitled Performance Feedback, Ms.  
13 Moberg wrote, "NOTE: Evaluation is based on information obtained from Lottery reports and  
14 previous records, contact with Region 2 Retailers/Telemarketing Representative, and evaluator's  
15 observations since August 2000." After Appellant read the review of his performance, he made a  
16 number of suggestions for changes to its content. Ms. Moberg told Appellant she would consider  
17 his suggestions.

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19 2.9 On December 12, Ms. Moberg mailed Appellant a final copy of the EDPP form with her  
20 signature. She requested that Appellant sign and return the form to her. Appellant subsequently  
21 spoke with Ms. Moberg and told her that the feedback session had not been conducted. After  
22 consulting with human resources staff, Ms. Moberg agreed to schedule a feedback session. Later  
23 that day, Ms. Moberg confirmed with Appellant that the feedback session was scheduled for  
24 January 9, 2001.

1 2.10 Appellant had concerns that Ms. Moberg was not complying with the agency's policy on  
2 conducting performance evaluations. He also felt Ms. Moberg lacked the necessary  
3 qualifications/skills and had spent an insufficient amount of time as his supervisor to adequately  
4 evaluate him. As a result, by letter dated December 29, 2000, Appellant asked for a mediator to  
5 attend the feedback session.

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7 2.11 On January 3, 2001, Ms. Moberg found Appellant's December 29 letter during a visit to the  
8 Region 2 office. Ms. Moberg conferred with Joan Reuell, Employee Services Manager, regarding  
9 Appellant's request. Ms. Reuell subsequently wrote Appellant a letter confirming that his request  
10 for mediation was granted and that Appellant could have a WFSE representative present during the  
11 meeting on January 9.

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13 2.12 On January 8, Appellant called his local WFSE office to request that his union  
14 representative attend the January 9 meeting. Appellant's union representative informed him that he  
15 could not be present at the meeting. Appellant called Ms. Reuell and notified her that he wanted to  
16 reschedule the feedback session because his union representative was unavailable. Ms. Reuell  
17 informed Appellant that the feedback session would occur on January 9 as previously scheduled.

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19 2.13 Kathy Jump, Assistant Director for Marketing and Sales, acted as the mediator during the  
20 January 9 feedback meeting. Also present at the meeting, in addition to Appellant and Ms. Moberg,  
21 was Steve Clink, who attended as an observer on Appellant's behalf. During the meeting,  
22 Appellant stated that he was entitled to have a union representative pursuant to Executive Order 71-  
23 04. Executive Order 71-04 was issued in 1974 and addresses management/labor relations, and in  
24 pertinent part, encourages management to "take positive steps to insure the right of employees  
25 and/or their authorized representative to meet with management representative without obstructions  
26 and delay."

1  
2 2.14 Ms. Jump informed Appellant that the feedback meeting would not be rescheduled and they  
3 would proceed to discuss his EDPP. Appellant also discussed the agency's policy on evaluations  
4 and whether his refusal to sign the evaluation would lead to disciplinary action. Ms. Jump informed  
5 Appellant that the purpose of the feedback session was to discuss the contents of the evaluation and  
6 attempt to reach agreement on changes acceptable to both parties. Ms. Jump informed Appellant  
7 that his signature was not required at that session and would not be a topic of discussion.

8  
9 2.15 Appellant stated his concern that the proper EDPP process was not being followed and that  
10 it was inappropriate for Ms. Moberg to conduct his performance evaluation. Appellant also made a  
11 number of suggestions regarding his performance, which he felt should be included in Ms.  
12 Moberg's evaluation. Ms. Moberg was not comfortable using language used in Appellant's  
13 previous evaluations and she rejected language Appellant suggested she include from his previous  
14 EDPP. Ms. Jump ultimately called the meeting to an end because she did not feel there was any  
15 progress toward coming to an agreement by both Appellant and Ms. Moberg as to what changes  
16 would be made in Appellant's EDPP.

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18 2.16 Appellant went on sick leave beginning January 16 through February 1, 2001.

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20 2.17 On February 5, Ms. Reuell sent Appellant his EDPP form, asked him to review and sign the  
21 evaluation and to attach his final comments and return the form back to her by February 16. The  
22 EDPP did not contain any changes. Appellant returned the EDPP form unsigned because his  
23 comments for Section IV were not typed into the EDPP.

24  
25 2.18 Section IV of the EDPP is entitled "Organization Support" and allows an employee to  
26 suggest "how his/her supervisor, coworkers and/or agency management can support you in the

1 present job and with future career goals.” The statement written by Appellant is approximately one  
2 page in length. Rather than have support staff retype the statement into the EDPP, Ms. Reuell noted  
3 under Section V (Comments and Signatures) of the EDPP, “See Scott’s notes as attached.” On  
4 February 28, Ms. Reuell mailed the EDPP form to Appellant and again requested that Appellant  
5 sign and return the evaluation and that he attach his final comments to Section I through IV by  
6 March 12, 2001. Appellant did not sign the EDPP form.

7  
8 2.19 Appellant was not subjected to any corrective or disciplinary action stemming from the  
9 January 9 meeting.

10  
11 2.20 On March 20, 2001, Appellant filed a rule violation appeal alleging the Lottery Commission  
12 made numerous violations of WAC 356-30-300 and the agency’s policy on performance  
13 evaluations regarding his performance evaluation for the period of October 1999 to October 2000.  
14 Appellant also alleged that the department violated Executive Order 71-04 by denying him the right  
15 to have a union representative present during the January 9, 2001 performance feedback meeting.

### 16 17 **III. ARGUMENTS OF THE PARTIES**

18 3.1 Appellant alleges that his annual performance evaluation was conducted more than 60 days  
19 after his anniversary date and that it did not cover the annual period required by WAC 356-30-300.  
20 Appellant asserts the department violated WAC 356-30-300 by evaluating his performance  
21 beginning in August 2000 rather than October 1999 and by completing the evaluation procedure  
22 outside of the 60-day period following his anniversary date. Appellant asserts that the department  
23 also denied him the right to have representation during the feedback meeting. Appellant asserts that  
24 he had a genuine belief that his interaction with his employer might lead to disciplinary action and  
25 that management's decision to deny him representation was unreasonable and violated his right to  
26 representation under his Weingarten Rights. Appellant asserts that the department failed to comply

1 with the requirements of the EDPP process by not holding a preview session with him, by not  
2 engaging in good faith mediation, by excluding his comments in section IV, and by inappropriately  
3 inserting them under employee comments (Section V). Appellant asserts there was no reason why  
4 Respondent could not type his comments into the body of the EDPP form rather than just attaching  
5 them. Appellant argues that the evaluation was not fair, did not reflect his true performance and  
6 was not consistent with his prior performance evaluations. Appellant asserts that his appeal should  
7 be granted, and that the evaluation should be removed from his personnel file.

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9 3.2 Respondent does not deny that the evaluation was completed after the 60-day requirement  
10 for conducting the evaluation. Respondent argues, however, that the requirement is directory and  
11 not mandatory. Respondent asserts that the objective of the evaluation has been met and that the  
12 value, validity and credibility of the evaluation were not compromised by the delay, which in part,  
13 was created by Appellant's actions. Respondent asserts that there is no evidence to indicate that  
14 Ms. Moberg did not contemplate the entire evaluation period or that information in the evaluation  
15 was outside of the pertinent timeframe. Respondent asserts that attaching Appellant's comments to  
16 the evaluation is sufficient and there is no requirement that they be typed into the form. Respondent  
17 asserts that Appellant had notice of the January 9 meeting and was given an opportunity to have a  
18 union representative present. Respondent contends, however, that the department was not required  
19 to reschedule the meeting so that Appellant could secure representation. Respondent further argues  
20 that Appellant presented no evidence to support he was adversely affected because his union  
21 representative did not attend the meeting. Respondent contends that the evaluation met the intent of  
22 the rule and that the appeal should be denied.

#### 23 24 **IV. CONCLUSIONS OF LAW**

25 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
26 herein.



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2 4.2 In an appeal of an alleged rule violation, Appellant has the burden of proof. (WAC 358-30-  
3 170).

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5 4.3 The first issue presented is whether Respondent violated WAC 356-30-300 when it  
6 conducted Appellant's evaluation more than 60 days following his anniversary date. This Board  
7 has previously determined that the provision in WAC 356-30-300(2) which provides that  
8 evaluations "will" be conducted during the 60 days after an employee's anniversary date is  
9 directory, not mandatory. In Sullivan et al, v. Dep't of Transportation, 71 Wn. App. 317, 858 P.2d  
10 283 (1993), the court affirmed the Board's determination that administrative requirements for  
11 completing performance evaluations are directory and that removing an untimely evaluation from  
12 an employee's personnel file is inconsistent with the purposes and goals of the evaluation program.  
13 Citing to Niichel v. Lancaster, 97 Wn.2d 620, 647 P.2d 1021 (1982), the court stated that the  
14 department's noncompliance with a directory statute does not invalidate employee evaluations.  
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17 4.4 Respondent was required to perform an evaluation of Appellant's performance in  
18 accordance with WAC 356-30-300. Ms. Moberg, in good faith, attempted to provide a timely  
19 evaluation and she started the process prior to Appellant's anniversary date of October 28.  
20 However, the miscommunication as to whether the December 11 meeting was a preview session or  
21 a feedback session resulted in a delay. Appellant also exercised his right to respond to his  
22 supervisor's comments with a lengthy, detailed response to his annual evaluation. Subsequent  
23 discussions and disagreement about whether Appellant's response should be attached or typed into  
24 the evaluation further hindered the process. The delays, however, did not negatively impact the  
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1 content of Appellant's evaluation. In this case, Respondent failed to complete Appellant's  
2 evaluation within 60 days of his anniversary date. However, we continue to hold that the timeframe  
3 found in WAC 356-3-300 is directory rather than mandatory. Furthermore, Appellant has failed to  
4 prove that he was adversely impacted by the untimely evaluation.

5  
6 4.5 The second issue presented is whether the evaluation covered a period of time that was  
7 inconsistent with the annual period required by the rule. The evidence is not clear as to whether the  
8 information Ms. Moberg gathered was exactly for a one-year period or if it extended beyond that  
9 period. Nonetheless, we cannot conclude that the process she employed to gather that information  
10 violated the procedures or made the evaluation invalid. Appellant has failed to show that the time  
11 period covered, as opposed to the content of the evaluation, had an adverse affect on his evaluation.  
12 Our ruling here is consistent with Lankow v. Dep't of Social & Health Services and Dep't of  
13 Personnel, PAB No. V85-109 (1986), in which we held that "the inclusion of an evaluation period  
14 of one year and six weeks was not a violation of the procedures and did not invalidate the  
15 evaluation."  
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18 4.6 The third issue is whether Respondent was required to type in Appellant's comments into  
19 the EDPP form rather than attaching them as a separate document. Appellant was provided the  
20 opportunity to respond and include additional comments to the evaluation. Neither WAC 356-30-  
21 300 nor the EDPP evaluation process require that Appellant and Respondent ultimately agree on the  
22 evaluation. We conclude that Appellant's evaluation appropriately indicates that Appellant's  
23 comments are attached and as such satisfies the purpose of allowing an employee to respond to an  
24 employee evaluation.  
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2 4.7 We conclude, therefore, that Appellant's performance evaluation satisfied the requirements  
3 of WAC 356-30-300. Appellant has failed to meet his burden of proving by a preponderance of the  
4 credible evidence that Respondent's actions violated WAC 356-30-300.

5  
6 4.8 The fourth issue is whether Respondent violated Appellant's right to have a representative  
7 present at the feedback session on January 9, 2001. Appellant cites the Weingarten Rights to  
8 support his contention. Under Weingarten, employees have a right to union representation during  
9 an investigatory interview by the employer, provided the employee "reasonably believes" the  
10 interview "might result in disciplinary action." (*NLRB v. J. Weingarten Inc.* 420 U.S. 251 (1975)).  
11 The January 9 feedback meeting was not an investigation. Nonetheless, Respondent approved  
12 Appellant's request to have a union representative present at the January 9 meeting. Appellant  
13 knew on December 19, 2000 of the January 9 meeting, however, he admittedly did not attempt to  
14 make arrangements to have his union representative present at the meeting until January 8.  
15 Appellant's failure to timely make this arrangement did not constitute a reasonable reason to further  
16 delay the meeting. Furthermore, the feedback meeting was intended to discuss the contents of  
17 Appellant's performance evaluation, an evaluation that contained positive remarks about  
18 Appellant's performance.  
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22 4.9 The final issue is whether Respondent violated its own policy on conducting performance  
23 evaluations and whether it violated Executive Order 71-04. RCW 41.06.170(2) provides for  
24 employees to appeal violations of the civil service laws and rules to this board. It does not provide  
25 for this board to adjudicate alleged violations of internal agency policies. Therefore, we cannot  
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1 consider the alleged violation of Respondent's policy on performance evaluations or Executive  
2 Order 71-04.

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4 4.10 Under the proven facts and circumstances presented here, the evaluation procedure utilized  
5 by Respondent complied with the requirements of the merit system rules and evaluation procedures  
6 and the appeal should be denied.

7  
8 **V. ORDER**

9 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Scott Syverson is denied.

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11 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

12  
13 WASHINGTON STATE PERSONNEL APPEALS BOARD

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Gerald L. Morgen, Vice Chair

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René Ewing, Member